

STATINTL

MEMORANDUM FOR:

OLC

SUBJECT: Comments on S. 3418, A Bill to Establish a
Federal Privacy Board

1. Your draft language for insertion as subsection 203(d) appears to exempt the Agency from all those provisions of the bill which were previously identified as cause for concern. However, we do have one further comment that may warrant consideration.

2. Your draft exempts the Central Intelligence Agency from subsection 105(a)(1), which gives the "Privacy Protection Commission" the power, among other things, to conduct inspections, hold hearings and to "take such testimony" and "require by subpoena the attendance of such witnesses . . . as the Commission deems advisable." Therefore, it does not appear that the Commission would be able to subpoena any Agency officers or employees. The same would not apply to former officers and employees, however. Since individuals in this category would no longer come under the Agency's exemption they could be subpoenaed by the Commission. This, coupled with the fact that subsection 105(a)(1) gives the Commission the power to grant testimonial immunity to witnesses seems to pose potential problems for the Agency. On the one hand the Commission would seek to compel testimony pursuant to its powers and the Agency would invoke the former employee's secrecy agreement in an attempt to prevent such testimony.

3. This situation is strikingly similar to United States v. Jarvinen (1952 unpublished) wherein the U.S. Attorney sought to compel testimony and the Agency refused to permit its agents to testify. The contempt conviction which followed most likely resulted because the matter in which the testimony was sought was a criminal case. This, of course, would not be the case with matters before the Privacy Protection Commission. However, potential problems may be avoided by addition to the proposed exemption of the language "or to present or former employees thereof" after "shall not apply to the Central Intelligence Agency."

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Office of General Counsel